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No. 966

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JAN 18 1967
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IN THE

Supreme Court of the United States

October Term, 1966

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
AND ITS LOCAL UNION 2958,

Petitioners,

v.

UNITED STATES OF AMERICA
AND
UNION CARBIDE CORPORATION,

Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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1. The Government's brief in opposition illustrates, we believe, a principal reason why the Court should grant certiorari: the apparent belief of the Government that it can cajole the courts into issuing "national emergency" injunctions without proving both statutory prerequisites.

Congress did *not* intend the injunction provisions to be applicable to every strike imperiling the national health or safety. It limited their availability to certain kinds of strikes, those affecting "an entire industry or a substantial part thereof". Section 208(a)(i). And, in *Steel Industry*,[1] this Court held that the Government must prove "upon the evidence adduced" that both statutory prerequisites are met.

In the lower courts, the Government made no attempt whatsoever to meet the "industry" requirement. It submitted an affidavit of Deputy Secretary Vance, simply asserting the statutory conclusion (R. 19), and it argued that

[1] *United Steelworkers* v. *United States*, 361 U.S. 39 (1959).

"The strike to be enjoined need not be industrywide if, in fact, it imperils the national health or safety." (R. 29).[2]

In this Court, the Government has grown bolder. It wishes to repair its evidentiary failure. And, to do so, it indulges in a blatant distortion (Brief in Opposition, p. 6):

> "Petitioners conceded, as the court of appeals pointed out, 'that the strike in issue may affect as many as 16,500 workers, representing 13% of the total industry' [i.e., the entire aircraft engine industry, including the military aircraft engine industry.]"

Petitioners conceded no such thing. In the face of the Government's failure of proof, petitioners might have rested. Instead, petitioners attempted to demonstrate how insubstantial a part of the aircraft engine industry was affected by the strike at the Kokomo plant. To this end, the affidavit of Wise Stone was submitted. This affidavit recited that the three plant making engines needing the Kokomo plant's products have a *total* employment of 16,500 (R. 53); that these plants manufacture items other than the engines affected by this strike (R. 52); that "many of these employees . . . are engaged in the manufacture of other items than the military aircraft engines involved in this case" (R. 53); that the employment figures for these plants, therefore, *greatly exaggerate the number of employees engaged in the manufacture of military aircraft engines at those plants* (R. 52); that, while total employment at these plants constitutes 13% of total employment in the industry, "this 13% includes an undetermined number of employees engaged in the manufacture of civilian aircraft engines and engine parts and other engines and parts designed for military use", and that "*the percentage* of the employment in the entire aircraft engine and engine parts industry which is *engaged in building the particular military engines which are involved in this*

[2] The Government's failure of proof was all the more revealing, for petitioners had put it on notice, 24 hours before the hearing, that they intended to assert that the "industry" requirement was not met.

case is obviously much smaller." (R. 53-54). (Emphasis added).

A similar misstatement appeared in the opinion of the Court below, (App. 42-43, n. 1). However, it did not appear in the portion of the opinion finding that the strike "affects a substantial part" of the industry, and it is therefore clear that the court below did not rely upon it in making that finding.

2. In a further effort to shore up the "substantial part of an industry" finding, the Government relies on the President's "finding" to the same effect. We have already noted that the President made no such "finding"; that his Executive Order states only his "opinion"; and that this Court has required that findings of fact be judicially made, "upon the evidence adduced", (Pet. pp. 19-20, n. 10).

The Government's persistent attempts in these Taft-Hartley cases to make the Executive Order a "finding" which will substitute for evidence has been criticized. Jones, *The National Emergency Disputes Provision of the Taft-Hartley Act,* 17 Western Reserve L. Rev. 133, 221-222, and n. 316, 318 thereat.

Nor can support for this practice be garnered from *Steel Industry.* There, the Court's opinion did not rely on the alleged "findings" of the President. While it is true that the concurring opinion of Justices Frankfurter and Harlan relied upon the President's opinion with respect to peril to the national safety, they did so because the President "is, after all, the ultimate constitutional executive repository for assuring the safety of the nation." 361 U.S. at 48. However, no similar expertise may be attributed to the President when it comes to determining whether the strike affects a "substantial part of an industry", for this is not a matter uniquely entrusted to his competence.

The Government's uniform reliance on the President's Executive Order as a "finding" is a further device designed to obliterate the "industry" requirement. Had the Court

below relied upon the President's "opinion" as a "finding," this would have constituted still an additional reason for review by this Court.

Respectfully submitted,

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